Supreme Court, U.S.
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No. 94-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

WINFORD KENT BISHOP,

Petitioner,

v.

STATE BAR OF GEORGIA,

Respondent.

For the Writ of *Certiorari* to
The Supreme Court of Georgia

Petition For Writ of *Certiorari* and Application to Defer Consideration

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56 pp

QUESTIONS PRESENTED

1. (*14th, 5th, 8th amendments, U.S. Const.*) Consistently with principles of procedural and substantive due process under the 14th amendment, in state supreme court "adversary proceedings of a quasi-criminal nature" (*In re Ruffalo*, 390 U.S. 544, 551 (1968)), may a lawyer be sentenced to a social and economic death penalty (total disbarment):

(a) *without actual knowledge* of the "Notice of Investigation", the "Notice of Discipline", or the disbarment (petitioner read about his own disbarment in a local newspaper two weeks after the court order, in the law office of a friend of 35 years, prior to a luncheon engagement)[1];

(b) *upon unsworn grievances* that petitioner had earlier answered completely at informal request of bar counsel[2];

(c) *upon the same transactions or occurrences* that the ex-client had raised in mandatory fee arbitration by a parallel state agency (created by the state supreme court) with the power to forfeit attorney fees for professional misconduct[3], *that petitioner had "won, won, won"*[4]; and does the acquittal of misconduct constitute issue-preclusion and double jeopardy under

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[1] Report, Special Master, June 7, 1993, par. 22-23, App. 20a. Cf., *United States v. James Daniel Good Real Prop.*, 126 L.E.2d 490 (1993).

[2] Transcript, Special Master's Hearing, May 20, 1993, p. 325, l. 1-5; contra: *Ex parte Burr*, 9 Wheat. 529, 532 (1824).

[3] Motion for Reconsideration received May 23, 1994 ("allowed filed" by order of June 6, 1994 [App. 35a]), p. 7, l. 16-20.

[4] T-331, App. 23a.

the 5th and 14th amendments;
(d) *without sworn evidence* ever adduced to support the charges[5] (and a former Assistant General Counsel of the State Bar gave an expert opinion that petitioner "performed properly in the circumstances")[6];
(e) *in secret proceedings* at which petitioner had no right to be present[7] at which no sworn evidence was proffered against petitioner[8] in violation of 6th amendment;
(f) *without a finding or conclusion that petitioner was morally unfit to practice law or guilty of any act of professional conduct*[9];
(g) *where organs of the state bar* (created and staffed by the state supreme court) found as fact that petitioner did not know of the proceeding and *ruled that*, while the letter of the rule was followed, *petitioner "was not afforded due process of law"*[10];

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[5] Master's Report, par. 5 (App. 13a); T-328-329.

[6] App. 122a.

[7] Brief of State Bar of Georgia (p. 6), filed Mar. 13, 1990, in Georgia Supreme Court, exhibit "B" to Respondent's Supplemental Brief, filed Jan. 3, 1994.

[8] T-59, l. 17-21. *In re Oliver*, 333 U.S. 257 (1967); *Withrow v. Larkin*, 421 U.S. 35 (1975),

[9] Cf. App. 30a with App. 5a.

[10] Report, Review Panel of State Disciplinary Board of State Bar of Georgia, August 25, 1993, p. 1 (App. 9a); Master's Report (App. 22a).

(h) *where* - after petitioner's *pro bono* counsel argued at oral argument before the state supreme court on November 16, 1993, that the bar service rules were constitutionally deficient - *the court determined to disbar but first to change the rules*[11], and then without notifying petitioner of impending rulemaking[12], went into legislative session, rescinded Old Rules pertaining to address-change notification procedure and Notice of Discipline procedure[13], wrote New Rules[14], applied the New Rules without saying so, *rendering incompetent or irrelevant petitioner's evidence* that he had given a post office box address to an assistant general counsel of the state bar from whom he had received correspondence at the box[15] and his residence address to the membership

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[11] Handwritten note upon an internal oral argument memorandum of the court filed in the court and found by petitioner on June 30, 1994 (App. 37a). A photocopy of the memorandum is attached to Exhibit "G" of petitioner's Application for Extension of Time to File Petition for Writ of Certiorari to the Supreme Court of the State of Georgia, No. A-53, filed July 25, 1994, denied July 29, 1994.

[12] Motion for Reconsideration, filed April 28, 1994, affidavit attached, par 4.

[13] Cf. Old Rules 1-207 (App. 63a) and 4-208.1 through 4-208.3 (App. 67a) with New Rules 1-207 (App. 71a) and 4-208.1 through 4-208.3 (App. 72a). *Contra: Motor Veh. Mfrs. Assn. v. State Farm Ins. Co.*, 463 U.S. 29 (1983).

[14] Ibid.

[15] T-5 (l. 4-14); T-7 (l. 22-24); T-9 (l. 9-18); Deft.'s Exh. No. 1 and 2.

coordinator[16], allegedly justifying a court finding of waiver of personal service of process and personal jurisdiction of the court[17];
(i) *upon charges that were vague and insufficient to give notice* of the ethical violations charged[18];
(j) *where any post office slips* that would have been produced by certified and registered mail and placed in the post office box petitioner shared with two other people for one year (and not "for years" as claimed in the Georgia order)[19] *would not have had space for the name of the sender* of the mailpiece[20]; and the special master believed him when he testified that he did

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[16] T-280 (l. 22-24); T-309 (l. 19-20); T-311 (l. 21-22); Deft. Exh. 19. Petitioner told Ms. Gayle Baker, Membership Coordinator of the State Bar of Georgia that he lived in Dawson County, Georgia. A letter addressed to "[petitioner], Dawson County, Georgia" would have been delivered to the farm at which petitioner was living whether by the post office (App. 125a) or the Dawson County Sheriff (App. 123a).

[17] The rules were amended to provide that use of a post office box constitutes a waiver of personal service. New Rules 1-207 (App. 71a) and 4-208.2(f) (App. 75a).

[18] Petitioner did not see the Notice of Investigation (App.46a) until March 9, 1993 [sic], when served by certified mail, return receipt requested (T-323 - 324). The State Bar claimed it used certified mail to make certain the notices were received by the petitioner this time (Response to Respondent's ... Extension of Time to Answer Notices of Investigation, filed April 29, 1993).

[19] Master's Report, par. 20 (App. 19a).

[20] T-151 (l 8-12); T-123 (l. 9-11); T-121.

not see any slips in his box[21];
(k) *where* during the pendency of the Notice of Discipline the lawyer appeared before the state supreme court in an unrelated case (which he won) and *received from the clerk docketing information therein at his post office box*[22];
(l) *where bar counsel* telephoned the post office for an explanation why the registered Notice of Discipline had been returned to the state bar[23], but *neglected to telephone petitioner* at a number which continued to be available to the state bar[24], or to inform the staff investigator of the box address or to direct him to go to the post office which served petitioner's old address for a change of address order[25], or to ask the sheriff of the county in which petitioner resided to make service of process upon him[26], or even to send him a letter by first class mail, and petitioner was all along willing to acknowledge service[27].

2. (*Question Fairly Included Within No. 1*) (*Congressional Expansion of Liberty*

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[21] T-330 (l. 19) (App. 23a); T-97.

[22] T-312-314.

23 T-64 (l. 2-9).

[24] T-344 (l. 5-14); T-303; Deft. Exh. 22 and 23.

[25] T-290 (l. 20) to T-291 (l. 3).

[26] Cf. Affidavit of Dawson County Sheriff with statement that the Fulton County Sheriff "does not do any investigating" (T-346).

[27] T-343.

under 14th (and 5th) amendment Due Process and Constriction of Personal Jurisdiction in State and Federal Courts to Actual Knowledge When Service by Mail is Utilized) Has the Congress, by virtue of the Acts of Aug. 2, 1982, P.L. 97-227 (96 Stat. 246), and Jan. 12, 1983, P.L. 97-462 (96 Stat. 2527), and the Supremacy Clause (Art. VI, Cl. 2, U.S. Const.) expanded the principle of "liberty" under the Due Process clauses of the 14th (and 5th) amendment, and constricted the principle of personal jurisdiction when it rejected the Supreme Court's 1982 proposed amendments to Federal Rule of Civil Procedure (FRCP) 4, pertaining to service of process by U.S. certified or registered mail, restricted delivery, and in lieu thereof (a) enacted in 1983 the California method of acknowledgment of service by first-class mail and (b) later permitted to go into full force and effect the Supreme Court's 1993 proposed amendments to FRCP 4, eliminating altogether service by mail in favor of a waiver of service provision; and therefore -

Does a state court have personal jurisdiction, consistent with 14th amendment due process, to terminate a person's property in a state law license and liberty to practice law *when* a state integrated bar association's *attempted service of process by certified and registered mail under state law has failed to impart actual knowledge* of quasi-criminal attorney disciplinary proceeding, and is such a decision void (see *Jaffee v. Federal Res. Bank of Chi.*, 100 F.R.D. 443, 445 (N.D.Ill. 1983) ("the specific return receipt requirement of Rule 4(c)(2)(C)(ii) makes it clear *actual* notice is demanded by the new service-by-mail provisions"; *Hannah v. Plumer*, 380 U.S. 460,463 (n.1) (1965) ("Actual notice is of course also the goal of

Rule4(d)(1)****)?

3. (*14th amendment Due Process and Equal Protection, 8th amendment*) Was petitioner deprived of liberty and property in violation of the 14th amendment in respect of such additional, fundamentally unfair procedures in the Georgia court as pertains to -

(a) *lack of standards* to guide Investigative Panel of State Disciplinary Board in determining whether to issue a Notice of Discipline, as opposed to a Formal Complaint (and does this absence also constitute a violation of the 8th amendment prohibition of cruel and unusual punishments);

(b) *abrupt departure from longstanding Georgia precedent* (e.g., *Strickland v. Willingham*, 17 S.E. 605 (1934) (disbarment process may only be served personally); *Roland v. Shelton*, 127 S.E.2d 497 (1962) (registered mail must be actually received by nonresident addressee); *Luxury Air Svc., Inc. v. Cessna Aircraft Co.*, 78 F.R.D. 410 (N.D.Ga. 1978) (Georgia does not permit service of original process by mail); *Jefferson Fire Ins. Co. v. Brackin*, 79 S.E. 467 (1913) (service void where defendant is no longer in county of "official" address)) without explanation; *Abba Gana v. Abba Gana*, 253 Ga. 340 (1983) (plaintiff must use strict due diligence to locate defendant before resorting to publication service); cf. *Congreso de Uniones Indus. v. NLRB*, 966 F.2d 36 (1st Cir. 1992) (Breyer, J.) (reasons must be given when departing from established precedent);

(c) *failure to consider factors in mitigation of punishment* (such as no previous grievance by ex-client or other attorney; *pro bono publico* service, etc.), also constituting cruel and unusual punishment under 8th amendment and denial of

Equal Protection under 14th amendment;
(d) *exploitative use of publicity* (T-339);
(e) *utilization of burden of proof less than beyond a reasonable doubt* as prescribed by bar rule (4-221(e)(2) cf.*In re Winship*, 397 U.S. 358 (1970));
(f) fact that at least two of four majority justices of Georgia court are or were members of bar committee that drafted Old Rules, one of whom was vice-chairperson[28], did not voluntarily recuse under *Limeco, Inc. v. Division of Lime*, 571 F.Supp. 710 (N.D.Miss. 1983), and the "writing judge" was not even a member of the court at time of oral argument[29]?

4. (*Art. I, Sec. 10, U.S. Const.*)
A. (*Bill of Attainder*) Did the Georgia court's purposeful action in connection with promulgating the New Rules constitute the enactment of a bill of attainder under the cited provision?

B. (*Ex Post Facto* law) Where the Georgia court does not say so but applies the New Rules retroactively, does such amount to imposition of an *ex post facto* law under the cited provisioni?

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[28] Justice Fletcher was then in the private practice of law and was vice-chairperson of the committee. Reconsideration motion, April 28, 1994, affidavit, par. He was also the justice that petitioner had a conversation with on Jan. 14, 1993, prior to petitioner's learning of the disbarment or proceedings (id.).

[29] A third justice (Thompson) was not a member of the court at the time of oral argument, yet he was assigned the task of w[illegible]ing the per curiam opinion. He delegated this task to Lisa Y. Smith, a law clerk. He authored the memorandum that added one paragraph to the draft opinion circulated by Ms. Smith. See App. and note .

5. (*8th amendment Cruel, Unusual Punishment, Excessive Fine*) Was it impermissibly disproportionate and a cruel and unusual punishment and an excessive fine to take away petitioner's livelihood, outstanding accounts receivable, work in progress, and to publicize these events for what might have been nothing more than a default or, if stretched, a mild criminal contempt, in violation of the 8th amendment (*Austin v. U.S.*, 113 S.Ct. 2801 (1993))?

6. (*14th amendment Equal Protection of the Laws*) Where Old Rule 4-208.2(c) called for, first, certified mail delivery (to a lawyer at no specific address, implying the correct address known to the sender) of the Notice of Discipline before any other form of service, and where service upon other respondent attorneys was initially attempted by certified mail, was it a deprivation of 14th amendment Equal Protection of the Laws for the state bar not to attempt first certified mail service of Notice of Discipline upon petitioner?

7. (*4th amendment Unreasonable Seizure of Liberty, Property*) Where the lawyer took reasonable steps to notify the state bar of his new address[30], did the Georgia court unreasonably seize his property and liberty in violation of the 4th amendment by entering the January 8, 1993 order and adhering to the seizure in its April 18, 1994 order, without giving him actual prior notice thereof?

8. (*5th amendment Double Jeopardy*)

A. Where the January 8, 1993 order of disbarment stated that "Service [of the Notice of Discipline] was perfected pursuant

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[30] Master's Report, par. 21 (App. 19).

to [Old] Rule 4-208.2(c) ....", the February 18, 1993 order remanded the case for a hearing "on the sole issue of whether [petitioner] was properly served" under the bar rules, and "temporarily vacated [the disbarment order] pending the foregoing", and where a U. S. district court interpreted these actions as to require a complete vacating of its order of February 24, 1994 (App. 45a), is not the order of April 18, 1994 barred under the 5th and 14th amendments?

B. Where petitioner would have been prohibited by Bar Rule from applying for discretionary reinstatement until January 8, 1996, under the first disbarment order, was it an impermissible extension of his punishment under the double jeopardy clause for the Georgia court to enter the April 18, 1994 disbarment order which in effect extends the minimum period of disbarment until April 18, 1997, so that he will be disbarred for more than a minimum period of three years?

9. (*6th amendment Speedy Trial*) Where an unsworn grievance is filed against petitioner in May, 1991 (39 months ago) and in July, 1991, for alleged acts as early as October 1, 1990 (46 months ago), which resulted in a first order of disbarment (19 months ago) on account of proceedings filed in the Georgia court in June, 1992 (26 months ago), and where on January 22, 1993, petitioner entreated the Georgia court to grant an immediate *de novo* hearing on the merits of the grievances, has not petitioner's right to a speedy trial been denied in contravention of the 6th amendment?

10. (*6th, 7th (and 14th) amendment Jury Trial*) Have not the Georgia proceedings deprived petitioner of his right to a jury

trial under the cited provisions?

11. (*5th (and 14th) amendment Public Taking*) Where a state bar pursues and the state supreme court enters a disbarment against an innocent lawyer in order to "test"[31] the constitutional validity of bar rules jointly produced by them, and the lawyer loses revenues, reputation, and identity, has there not been a taking of his property and liberty for a public purpose under the cited provisions requiring just and prompt compensation?

12. (*Sherman Act, Sec. 1, Anticompetitive Behavior*) Is a violation of 15 U.S.C. Sec. 1, a valid defense to disciplinary proceedings; that is to say, since lawyers have a substantial impact upon interstate commerce, where the president, general counsel, and other members of the State Bar of Georgia act as a trade organization (a) to protect its public image[32], (b) to improve its profitability[33], and (c) to keep the state legislature from removing the State Bar of Georgia from the aegis of the state supreme court and placing it under the legislature[34] and initiate disciplinary proceedings against a lawyer lacking in due process to accomplish those goals, may not the lawyer use this fact to procure a dismissal of the proceedings?

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[31] T-332, 336 (App.24a).

[32] Reconsideration, April 28, 1994, affidavit par. 7 (a), (e), (l), (m), (q).

[33] Id. Affidavit, April 28, 1994 par. 7 (h) (Elliott), (k) (Winborn), (t).

[34] Id. 7(q).

13. (*14th amendment Due Process, Administrative Law*) Consistently with procedural and substantive due process, once the Georgia court determined to suspend the adjudication of petitioner's case and to rescind the Old Rules and to promulgate the New Rules,
(a) was the court obligated to follow its own rules therefor (Rule 5-101) (*Morton v. Ruiz*, 415 U.S. 199 (1974);
(b) could the court ever effectively cease rulemaking in respect of petitioner's case;
(c) how would a reviewing court discern whether the April 18, 1994 order was rulemaking or adjudication;
(d) how would a reviewing court discern whether the state court was acting as an administrative agency, or as a judicial tribunal, and when in each role;
(e) where federal administrative law holds generally that an agency's legal decisions are to be respected by the federal courts, but the agency's policy decisions may be second-guessed by the courts, what standard of review should apply to the Georgia order?

14. The decision of the Supreme Court of Georgia is contrary to the following decisions of the Supreme Court of the United States: *In re Ruffalo*, 390 U.S. 544 (1968); *Robinson v. Hanrahan*, 409 U.S. 38 (1972), *reversing* 284 N.E.2d 646 (Ill. 1972); *Hess v. Pawloski*, 274 U.S. 352 (1927); *Wuchter v. Pizzuti*, 276 U.S. 13 (1928); *City of N.Y. v. New York, N.H. & H. R.Co.*, 344 U.S. 293 (1953).

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No. 94-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

WINFORD KENT BISHOP,

Petitioner,

v.

STATE BAR OF GEORGIA,

Respondent.

Petition For Writ of *Certiorari* to The Supreme Court of Georgia

COMES NOW the petitioner and requests this Honorable Court to grant his petition for a writ of *certiorari* and respectfully shows the following:

OPINIONS BELOW

The opinion of the Supreme Court of Georgia (App. 5a) is reported officially in 264 Ga. (Adv. Sheets) 241 and unofficially at 442 S.E.2d (Adv. Sheets) 732. The opinion of the Review Panel of the State Disciplinary Board of the State Bar of Georgia (App. 9a) is unreported. The opinion of a Special Master (App. 11a)

appointed by the Georgia court (App. 28a, 29a) is unreported. The master's verbal findings (App. 23a) are unreported. The vacated opinion of the Georgia court (App. 30a) was unofficially reported at 93 Fulton County Daily Report (FCDR) (1993). The order and award of the arbitrators (App. 32a) is unreported, as is there ruling on reconsideration (App. 34a).

JURISDICTION

The Georgia court entered "a final judgment of disbarment" on April 18, 1994 (cf. App. 36a with App. 8a). A petition for rehearing was timely filed on April 28, 1994, and was denied by order entered on May 13, 1994 (App. 36a). On June 6, 1994, the court ruled that "the Second Motion for Reconsideration in this case, received on May 23, 1994, is hereby allowed filed" but "further ordered that upon consideration of such motion, it is ordered that it be hereby dismissed." (App. 35a). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS INVOLVED IN THIS CASE

The provisions of the U.S. Const. involved in this case are the following: Art. I, Sec. 10; amendments IV, V, VI, VII, VIII, XIV (App. 55a); and they were timely raised (App. 78a). The federal statute involved in this case is the following: 15 U.S.C. Section 1 (App. 61a); and it was timely raised (App. 83a). Other constitutional and statutory provisions are relevant in argument and are set forth in the Appendix. The Rules and Regulations for the Organization and Government of the State Bar of Georgia, 219 Ga. 873 (1964), as amended, involved in this case are numerous (App. 63a); and they were timely raised.

Analogous bar provisions from other

jurisdictions are included in the Appendix (App. 84a). Model rules of the American Bar Association are included (App. 115a), as is a rule of the U.S. Court of Appeals for the 11th Cir. (App. 117a).

STATEMENT OF THE CASE

A. Facts

Petitioner is actually innocent of any professional misconduct (Aff., James E. Spence, Jr., former Assistant General Counsel of the State Bar of Georgia, May 23, 1994 (App.121a). In 1991 petitioner won a fee arbitration against the bar complainant before an arbitration tribunal created by the State Bar of Georgia Committee on Fee Arbitration (App. 32a). This is a coordinate state agency (see *Guralnick v. Supreme Ct. N. J.*, 747 F.Supp. 1109 (D.N.J. 1990)). In the fee arbitration, complainants (an ex-client and his first/fourth [sic] lawyer) raised the same alleged acts of professional misconduct as in the subsequent, grudge, unsworn bar complaints (contra: *Ex parte Burr*, 9 Wheat. 529, 532 (1824)). The tribunal found that respondent's fees were "reasonable and appropriate" and he was "not required to return any monies to [the complainant]". Since Georgia law provides for forfeiture of an attorney's fee when the lawyer is guilty of misconduct (*Sweeney v. Athens Reg. Med. Ctr.*, 917 F.2d 1560 (11th Cir. 1990)), petitioner's victory is not only preclusive on the issue of misconduct (*Ashe v. Swenson*, 397 U.S. 436 (1970)), but it constitutes jeopardy for purposes of the 5h amendment protection against double jeopardy (cf. *Freer v. Dugger*, 935 F.2d 213, 218 (11th Cir. 1991)).

Petitioner was at all times amenable to process in Dawson County, Georgia where he resided throughout the disciplinary

proceedings (App. 123a, 125a); and he advised the Membership Coordinator of the State Bar of Georgia of his residence and address in Dawson County on October 4, 1991, prior to the issuance of the Notice of Investigation on January 3, 1992 (Transcript, May 20, 1993, 280-284; Deft. Exh. 19; Report, Special Master, June 7, 1993, Finding 21). Respondent obtained a promise in 1991 from an Assistant General Counsel of the State Bar that the latter would telephone him if any further action was to be taken on the unsworn, grudge grievances which respondent had answered in full upon the request of the bar (T-259, l. 14-15; Affidavit, January 22, 1993, par. 3). The bar counsel even wrote respondent at his post office box address in November, 1991 (Deft's Exh. 1, 2).

The testimony of the employees of the United States Postal Service was speculative, contradictory to sworn affidavits (cf. T-180 with Affidavit, February 4, 1993; cf. Finding 11 with Affidavit, June 8, 1993), inconsistent with the *USPS Domestic Mail Manual*, Exh. 151.151A which requires that mail containing address labels stating: "Address Correction Requested - Return Postage Guaranteed" be not forwarded but the new address be placed thereon and the mailpiece returned to the sender (T-138, 142, 148).

The Special Master stated that he believed the petitioner when he said he never saw any slips from the post office in the box he shared with two other people when the Bar was mailing notices to him (T-330, l. 19-25). Moreover, the slips themselves did not contain a blank for inserting the name of the sender (T-151, l. 8-12; T-123, l. 9-11; T-121). The master also believed petitioner when he said that his victory in

the fee arbitration caused him to believe the grievance matter was "dead and gone and over with" (T-98; T-331 (l. 7-9)); there is testimony from another attorney in the record that no one ever informed him that a grievance against him was "dead docketed" but he had heard nothing in over two and a half years (Motion for Reconsideration, Apr. 28, 1994, exhibit: Transcript, *In re Robinson*, p. 60 (l. 23) to p. 61 (l. 13)).

The State Bar did not comply with Old Rule 4-208.2 pertaining to service of the Notice of Discipline because it did not attempt certified mail or personal service by a designee of the Chairperson of the Investigative Panel. The presumptions of the old rule (e.g., that a sheriff [of no specific county]'s *non est inventus* return was proof that service could not be perfected by certified mail or personal service by a designee of the Investigative Panel) are void for impermissibly shifting the burden of proof away from the state bar under the bar rules and placing same on petitioner. *Ulster Co. Ct. v. Allen*, 442 U.S. 140, 156-160 (1979); *Sandstrom v. Montana*, 442 U.S. 510 (1979). Petitioner argued their unconstitutionality to the Special Master and the Review Panel, both of which expressed the opinion that petitioner had not been afforded due process of law (App. 9, 21).

The Georgia court, rather than find that the old rule was unconstitutional or that it was not complied with, for the purpose of nailing petitioner (and constituting a bill of attainder under *Nixon v. Administrator, Gen. Svcs.*, 433 U.S. 425 (1977)) SUSPENDED THE ADJUDICATION OF PETITIONER'S CASE, convened as a legislative body, rescinded Old Rule 4-208.2, and promulgated New Rule 4-208.2 on March 11, 1994, and had it

published by Darby's *Georgia Advance Sheets* on April 14, 1994, which *inter alia* imposes new restriction on members of the bar that (a) use of a post office box constitutes a waiver of personal service of disciplinary proceedings and (b) notification of a new address to anyone but undesignated personnel of "the Membership Department", a new and undefined concept, is not effective. Then in the order on petitioner's case, filed April 18, 1994 (App. 5-8) the Georgia court did not explicitly apply either the Old Rule or the New Rule, but a general Due Process analysis. However, in doing so, the court *sub silentio* applied the two new provisions listed above and rendered irrelevant, incompetent, or immaterial respondent's notification to the Assistant General Counsel in 1991 of his new post office box address and to the Membership Coordinator in 1991 of his new residence address in Dawson County (*contra*, *The Miss. Bar v. Attorney G*, 630 So.2d 348 (Miss. 1994)), constituting an *ex post facto* law under *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 1 L.Ed. 648, 650 (1798) (as a fourth example, the court said: "Every law that alters the legal rules of evidence, and receives less, or different, testimony than the law required at the commission of the offense, in order to convict the offender").

In obtaining copies of misplaced documents from the Georgia court file on June 30, 1994, petitioner found as a regular part of the file (and had photocopies made by a court employee) of internal memoranda (attached to his Application, No. A-53, filed July 25, 1994; App.), indicating that the court, after oral argument on November 16, 1993, determined to disbar but to withhold any opinion until Old Rule 4-208.2 could be amended to permit that result. This gives rise to respondent's claim that

the rescission of Old Rule 4-208.2 and promulgation of New Rule 4-208.2 constitute a bill of attainder and an *ex post facto* law.

B. Proceedings Below

On January 20, 1993, while waiting to go to lunch with a partner of an Atlanta law firm whom he had known for 35 years, respondent read in the *Fulton County Daily Report* that he had been disbarred by the Georgia court on January 8, 1993. mmediately contacting the general counsel of the state bar, respondent learned that a Notice of Discipline (a discipli-nary procedure promulgated in 1991) had been filed in the court on June 1, 1992, but had not been personally served on him. Further inquiry disclosed that two unsworn grievances were attached to the notice of discipline and filed with the court. Those grievances turned out to the two he had answered in detail in 1991 at the request of Assistant General Counsel Cohen. The grievances raised identical issues to those resolved in respondent's favor in the fee arbitration a year and a half before.

Respondent promptly filed a motion to vacate the January 8, 1993 order and remand for a *de novo* hearing before the State Disciplinary Board on January 22, 1993, with affidavits and documentary evidence, later amended. The bar opposed the motion.

In an order of February 18, 1993, the Georgia court remanded the case to the Review Panel of the State Discipli-nary Board and appointed a Special Master to conduct a hearing within 60 days "on the sole issue of whether respondent had been properly served" under Bar Rules 4-204.2 and [Old] Rule 4-208.2(c), as interpreted by the

master. The order "temporarily vacated" the disbarment order "pending the foregoing proceedings". The Review Panel was directed to expedite its review.

Special Master James R. Fortune, Jr., of Spaulding Co., Ga. held a hearing on May 20, 1993, that was transcribed. He entered findings of fact, conclusions of law, and a recom-mendation that petitioner's disbarment be set aside and he be allowed to address the charges against him, on June 7, 1993. The Review Panel adopted same and concurred in the recommendation in a report dated Aug. 25, 1993.

The case was refiled in the Georgia Supreme Court on Sept. 3, 1993. Oral argument was held Nov. 16, 1993. On Feb. 28, 1994, Chief Justice Clarke who had presided at oral argument retired. Justice Thompson replaced him in March, 1994. While the case was pending, the Georgia court rescinded the Old Rules and enacted New Rules to replace the Old Rules and directed the State Bar to publish them to coincide with publica- tion of petitioner's disbarment order on Apr. 18, 1994, in which Justice Thompson's vote was necessary to break a 3 to 3 tie. Petitioner filed a motion for reconsideration on Apr. 28, 1994, raising issues of ex post facto law and bill of attainder and other constitutional issues. The court denied the motion on May 13, 1994, holding that the Apr. 18 order was a final judgment of disbarment. Petitioner filed a second motion for reconsideration on May 23, 1994, raising the court's non-consideration of mitigating factors. The court allowed the filing, but dismissed the motion in an order of June 6, 1994. Petitioner subsequently filed a combined motion for a writ of *habeas corpus*, a motion for reconsideration of the

June 6, 1994 order, both on June 16, 1994, a motion for a writ of error *coram nobis* on June 27, 1994, and a first amendment thereto attaching thereto the internal memoranda of the court discovered in the file on July 1, 1994. There has been no order entered on any of said filings to petitioner's knowledge.

REASONS FOR GRANTING *CERTIORARI*

I. The Georgia case conflicts with (a) legislative decisions of Congress in 1982-1983 and 1993 in abolishing service of process by mail in federal district courts and in expanding the concept of individual liberty under the Due Process clauses of the 5th and 14th amendments by constricting the personal jurisdic-tion of federal courts and state courts under the Supremacy Clause to receipt of actual notice when service by mail is utilized and (b) modified public policy.

A. Introduction

The U.S. Const., Art. III, Sec. 1, establishes "one supreme Court" but assigns to Congress the power to "ordain and establish" "inferior Courts". The U.S. district courts (and the courts of appeals) are such courts. The Necessary and Proper Clause of Art. I, Sec. 8, cl. 18, gives to Congress the power to regulate the practice and procedure in the inferior federal courts. Congress enacted the Rules Enabling Act, 28 U.S.C. Sec. 2072, to delegate to the Supreme Court *inter alia* the drafting of civil practice rules for the district courts. However, the delegation is conditional: while the Supreme Court proposes rules, the Congress may intervene to prevent the proposed rules from going into effect. *Burlington N.R.R. Co. v. Woods*, 480 U.S. 967 (1987).

In practice an Advisory Committee on Civil Rules of the Judicial Conference of the U.S. drafts the proposed rules, another committee of the Conference (the Committee on Rules of Practice and Procedure) reviews them, the Conference itself passes upon and submits them to the Supreme Court. The latter then cursorily looks over and

transmit them to Congress. *In re Amendments to FRCP*, April 22, 1993, statement of Justice WHITE ("the Court's role *** is to transmit the Judicial Conference's recommendations without change and without careful study ***)." 113 S.Ct. 577, 579.

In 1982 the Supreme Court submitted to Congress proposed amendments to FRCP 4(d) permitting service of process by U. S. certified and registered mail, restricted delivery, BUT ONLY in accordance with the rule (FRCP 4(d)(7) ("except that a summons and complaint by mail may be served only as authorized by and pursuant to the procedures set forth in paragraph (8) of this subdivision [d] of this rule") (93 F.R.D. 255, 256).

> Proposed Rule 4(d)(8) provided in part:
> "(d) Summons and Complaint: Personal Service and Service by Mail. *** (8) Service *** may be made by the plaintiff or by any person *** by registered or certified mail, return receipt requested and delivery restricted to the addressee. Service pursuant to this paragraph shall not be the basis for the entry of a default or a judgment by default unless the record contains a return receipt showing acceptance by the defendant or a returned envelope showing refusal of the process by the defendant. If delivery of the process is refused, the person serving the process, promptly upon the receipt of the notice of such refusal, shall mail to the defendant by first class mail a copy of the summons and complaint and a notice that despite such refusal the case will proceed and that judgment by default will be rendered against him unless he appears to defend the suit. Any such default or judgment by defendant shall be set aside pursuant

to Rule 55(c) or Rule 60(b) if the defendant demonstrates to the court that the return receipt was signed or delivery was refused by an unauthorized person" (93 F.R.D. 255, 256-257).

Congress first delayed the effective date of the amendment (Act, Aug. 2, 1982, P.L. 97-227 (96 Stat. 246)) and then rejected it (Act, Jan. 12, 1983, P.L. 97-462 (96 Stat. 2527)). "The [House] Committee [on the Judiciary] received numerous complaints that the *** changes saddled litigators with flawed mail service *** ." 96 F.R.D. 117. Instead, Congress passed legis-lation based on House Bill 7154 that "provides a system of service by mail similar to the system now used in California." 96 F.R.D. at 119. Essentially, this provided for acknow-ledgment of service by a notice mailed by first class mail to the defendant. He was free to acknowledge or ignore, but if the latter, he could be made to pay the costs of personal service upon him. The 1983 amendments became effective in February 26, 1983 (96 F.R.D. 81).

B. Personal Jurisdiction; Service of Process; Notice; and Due Process of Law.

"[T]he only source of the personal jurisdiction requirement" in litigation is "the individual liberty interest protected by the Due Process of Law Clause of the Fourteenth Amendment" (4 Wright & Miller, *Federal Practice and Procedure, Civil 2d*, p. 292, citing *Insurance Co. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982)). The principle of personal jurisdiction is different from the technique of service of process.

"Strictly speaking Rule 4 does not deal directly with jurisdiction over the subject matter, jurisdiction over the

person, or venue. The federal rules were not designed to affect jurisdiction or venue and this is expressly stated in Rule 82. Indeed, it is doubtful whether the language of the Rules Enabling Act delegates sufficient authority to the Supreme Court to draft a federal rule touching upon these subjects."

4 Wright & Miller, *Federal Practice and Procedure, Civil 2d*, p. 225; see *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (maintenance of a suit must be both "reasonable" and based on minimum contacts); 101 *Harv. L. Rev.* 260 (1986).

The editors of the Harvard Law Review (which included a now-sitting justice) in "Developments in the Law, State-Court Jurisdiction", 73 *Harv. L. Rev.* 911, 987 (1960), observed that while "adequate notice is a prerequiste to jurisdiction" (citing to *Wuchter v. Pizzuti*, 276 U.S. 13 (1928)), *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), was the first case to distinguish notice from personal jurisdiction. Respondent believes that the broad dicta in *Mullane* has been disaffirmed by the high court in *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983); cf. *Greene v. Lindsey*, 456 U.S. 444 (1982).

C. Application of Law to Fact.

In 1982 and 1983 Congress reined in the Judicial Conference of the U.S., not only to curtail acceptable techniques of service by mail, but to offer a politically acceptable definition of personal jurisdiction when service is made by mail (actual notice). The ultimate effect is to refine the meaning of the Due Process Clause of both the 5th and 14th amendments (see Justice SCALIA's definition in *Burnham v. Superior Ct. of Calif.*, 495 U.S. 604, 627

n.5 ("'Due process' (which is the constitutional text at issue here) does not mean that process which shifting majorities of this Court feel to be 'due'; but that process which American society - self-interested American society, which expresses its judgments in the laws of self-interested States - has traditionally considered 'due'"). The U.S. Department of Justice accepted the restrictions, although it had initially been in favor of the Supreme Court's 1982 proposal. 96 F.R.D. at 116-117.

A useful analogy is offered in federal interpleader practice (28 U.S.C. Sec. 1335). As the Court is aware, such has nationwide service of process provisions (28 U.S.C. Sec. 2361). However, if there is not a *res*, a defendant residing outside the judicial district of the federal district court is not bound personally, *New York Life Ins. Co. v. Dunlevy*, 241 U.S. 518 (1916). Note the instructive language of Judge Goodrich of the Ninth Circuit in *Hagan v. Central Ave. Dairy*, 180 F.2d 502, 503 (9th Cir. 1950):

> "We think the District Court of California did not have personal jurisdiction over the absent non-consenting Arizona corporation except to the extent of the corporation's interest in the escrow fund. That the court had jurisdiction that far is clear from the [federal interpleader] statute. Furthermore, *if Congress had so provided, we think there is no reason why process from the United States District Court could not run country-wide. But Congress has not so provided*, generally, and a District Court's power to hear and decide cases involving personal liability of an individual is limited to those served within the state where the court sits"

[emphasis added; note omitted].

Respondent's point is that if Congress can make process run country-wide, Congress can limit the effectiveness of process and personal jurisdiction when service is by mail, to actual notice. And "Actual notice is of course also the goal of Rule 4(d)(1) ****", *Hannah v. Plumer*, 380 U.S. 460, 463 (n.1) (1965). The resultant effect on Due Process is inescapable.

Congress' restriction on service of process by mail and on personal jurisdiction must be respected, and state court rules and decisions to the contrary must be struck down when they violate the principle. Besides the Supremacy Clause of Art. VI, Cl. 2, there are three good reasons for this:

(1) *Arrowsmith v. United Press Int'l*, 320 F.2d 219 (2nd Cir. *en banc* 1963), holds that federal courts in diversity cases must apply state statutes as to personal jurisdiction and cites to Hart & Wechsler, *Federal Courts* (1953), that "Rule 4(d)(3) of the Rules of Civil Procedure tells *how* service of process is to be made upon a [defendant] which is subject to service; but it does not tell *when* the [defendant] is so subject. [emphasis added]" *Arrowsmith*, which overruled an alternate holding in *Jaftex Corp. v. Randolph Mills, Inc.*, 282 F.2d 508 (2nd Cir. 1960), is settled consti-tutional law today.

(2) Undoubtably, the Georgia court's promulgation of a rule permitting valid service by mail without actual notice to the defendant will encourage federal plaintiffs in the Eleventh Circuit, and eventually throughout the country, to attempt service by mailing to stale, but "official", addresses, and this will lead to federal

litigation over the validity of personal jurisdiction upon hapless defendants. If sustained, the defendant's ignorance will result in revocation of licenses and deprivation of property and liberty without personal knowledge. *This result would be offensive to the members of Congress who first voted down the Supreme Court's proposed amendments in 1982 and then voted out the actual-notice mail provisions in 1983.*

(3) In federal judicial districts rejecting the Georgia practice, plaintiffs would not have this ability. Defendants there would be better off. This would suggest not only a lack of uniformity, but also an unequal protection of such plaintiffs in violtion of the 14th amendment.

These occurrences and discrepancies could have been precisely what Congress wanted to prevent when it rejected the 1982 proposed amendments to Rule 4.

II. The Georgia case conflicts with bar rules and laws of several jurisdictions, but may be read as consistent with model ABA rules and rules and statutes of some states, thus calling for resolution by the Court in this case.

A. Introduction.

In the Appendix is set forth verbatim provisions of bar rules and other statutes of numerous jurisdictions obtained from a brief filed on Sept. 23, 1993, in the Georgia court by the State Bar of Georgia. While not independently verified petitioner assumes that the cited rules/laws are currently in effect in the respective jurisdictions. Also included are model rules of the American Bar Association obtained from the same source and Addendum

Eight (Oct. 1992) of the rules of the U.S. Court of Appeals for the Eleventh Circuit.[35] Petitioner notes that the bar omits the law of 21 states. Petitioner briefly checked the law of one missing jurisdiction, South Carolina, and discovered a statute requiring actual personal delivery of disciplinary process upon a lawyer (*Code of Laws of S.C.*

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[35] Footnote 2 of the bar's Sept. 23, 1993 brief reads as follows: "See 'Survey of other Disciplinary Service Rules' appended hereto. The following jurisdictions adopt the ABA Model Rules and Eleventh Circuit Rule. (Service may be perfected by personal service or certified or registered mail to attorney's last known address of record). Delaware, Louisiana, Montana, Tennessee, Utah, Kansas, Nevada, and the District of Columbia. Other jurisdictions have adopted provisions similar to the ABA Model Rules with minor distinctions. The following states provide for service by personal or certified or registered, or regular mail. Iowa, Maine, Pennsylvania, Rhode Island, Texas, and New Mexico. The following states provide for service by certified or registered, or regular mail: Florida, Ohio, Arkansas, New Hampshire, and Virginia. The following states provide for service by certified mail to the last known address. If service is not perfected by certified mail, service may be perfected by publication: Idaho and Nebraska. The following state provides for personal service; in the event service is not perfected personally, service by publication or by regular mail may be made after application to the supreme court: Oregon. The following States require that service of a Complaint be made personally; however, if service cannot be made in this manner because the Respondent cannot be found, is evading service, and/or canno[t] be served after due diligence, service may be made by mail: Arizona, Hawaii, Illinois, New York, and Wisconsin. The following States require that service of a Complaint be made in accordance with the Civil Practice Act: Alabama, Minnesota, Mississippi, and West Virginia."

Sec. 40-5-520, App.). From this he infers that the other 20 omitted states also require personal service (otherwise, the state bar would have attached them). When that number (20 states) is added to the four states that permit service per civil practice acts and five states that require personal service unless being evaded, the number would be 30 states that require personal service. Thus, a majority of jurisdictions in the U.S. would require personal service, as at common law. *Strickland v. Willingham*, 17 S.E. 605 (Ga.App. 1934).

B. Misreading and Misapplication.

While the Georgia court does not mention these bar or model rules in its decision, the absence of any case citation suggests it was impressed by them in approving the law clerk's draft opinion. However, the court was misinformed into thinking that techniques for service of process, actually carried out, automatically translate into personal jurisdiction over a lawyer, as discussed above.

III. The Georgia case conflicts with a recent decision of the Mississippi Supreme Court in *The Miss. Bar. v. Attorney G*, 630 So.2d 348 (1994), that an amendment to bar rules to cover the case before the court would not be applied to the lawyer before the court.

A. Introduction.

In the cited case, the court perceived that the existing bar rules did not permit an expedited disciplinary proceeding to be employed where the lawyer was not convicted of a crime but admitted commission of facts warranting conviction. The court amended the rules, stated them in an appendix to the opinion, but declined the bar's request over

a dissent to apply the amended rules to the lawyer. The court implied that it would be unfair to apply them to the attorney and held that he would be entitled to an evidentiary hearing.

B. Retroactivity.

The application of a statute to preexisting facts involves fundamental fairness under the Due Process clause of the 14th Amendment. See C. Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 *Harv. L. Rev.* 692, 697 (1960) ("The constitutionality ... is determined by three major factors, each of which must be weighed in any particular case. These factors are: the nature and strength of the public interest served by the statute, the extent to which the statute modifies or abrogates the asserted preenactment right, and the nature of the right which the statute alters.").

IV. The Georgia case conflicts with a recent decision of the West Virginia Supreme Court of Appeals, *Committee on Legal Ethics v. Boettner*, 394 S.E.2d 735 (1990), that "procedural due process" requires a hearing at which an attorney may establish factors in mitigation of punishment for bar infractions.

A. Introduction.

In the West Virginia case the lawyer had pleaded no contest to a crime. He was a public figure and had accomplished a lot for the state. He succeeded in persuading the court to consider mitigating factors even in light of a criminal conviction. See concurring opinion in *The Miss. Bar*, 630 So.2d 348, 350 ("Attorney G should certainly be afforded due process. This, however, can be accomplished by ... requesting a hearing concerning any possible mitigating

circumstances.")

B. Georgia procedure.

At the time of petitioner's disbarment, Georgia bar rules did not require the Georgia court to consider matters in mitigation in fixing punishment for disciplinary infractions. However, as a matter of practice, such factors were considered (e.g. *In re Carter*, 423 S.E.2d 897 (Ga. 1993); *In re Patterson*, 423 S.E.2d 248 (Ga. 1993); *In re Stubbs*, 380 S.E.2d 462 (Ga. 1989)). The Georgia court's amendment of the bar rules on March 11, 1994, made effective on Apr. 14, 1994, requires the Office of General Counsel to set forth in the Notice of Discipline such matters (see New Rule 4-208.2(a)(4). Since such application would benefit petitioner, on reconsideration he asked that said factors be considered in his case. This request was denied.

C. 8th Amendment.

A disbarment is an economic and social death penalty. This Court has held that in a physical death penalty case the 8th amendment requires the sentencer to consider matters in mitigation. *Mills v. Maryland*, 486 U.S. 367 (1988); *McKoy v. North Carolina*, 494 U.S. 433 (1990).

V. The Georgia case conflicts with some decisions of this Court that the practice of law under a law license conferred by a state is a liberty protected by the Due Process clause of the 14th Amendment, but the decisions of this Court are not consistent, and the Court should grant certiorari to clarify this area of law.

A. A Right

These cases indicate that a law license is a property and law practice a liberty: *Ex*

parte Garland, 71 U.S. (4 Wall.) 333, 377 (1867); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 354-355 (1871); *Ex Parte Wall*, 107 U.S. 265, 289 (1882); *Schware v. Board of Bar Exam.*, 353 U.S. 232, 239 (n. 5) (1957); *Konigsberg v. State Bar of Calif.* (I), 353 U.S. 252, 257-258 (1957); *Spevack v. Klein*, 385 U.S. 511, 516 (1967); *In re Ruffalo*, 390 U.S. 544 (1968) (implicit).

B. A Privilege.

These cases indicate they are a privilege: *In re Snyder*, 472 U.S. 634, 644 (1984), citing *People ex rel. Karlin v. Culkin*, 162 N.E. 487 (1928) (Cardozo, J.).

C. Georgia case law also shows Mix

Cf. *State of Georgia v. McMillan*, 319 S.E.2d 1 (1984); with *Gordon v. Clinkscales*, 114 S.E.2d 15 (1960).

VI. The Georgia case conflicts with a decision of the U.S. Court of Appeals for the Fifth Circuit, *In re Thalheim*, 853 F.2d 383 (5 Cir. 1988), that a lawyer may not be disciplined except upon an explicit finding that he is morally unfit for the practice of law.

A. Introduction.

The Georgia court disbarred petitioner either because he defaulted in not answering the Notice of Discipline, or because he was guilty of a criminal contempt of the court for not picking up post office slips giving notice that certified of registered mail was waiting at the post office for him (although not giving the name of the sender of the mail). There is no explicit finding that petitioner was guilty of an infraction of a disciplinary rule, or that he was otherwise guilty of professional misconduct. There is nothing about not picking up certified or registered mail that is unique to lawyers,

and others have not been penalized therefor when there was lack of actual notice.

B. ***Thalheim***.

By contrast, the Fifth Circuit court of appeals held that the district court had improperly suspended Thalheim when it had failed to enter a finding of fact that he was morally unfit to practice law in the district court.

C. **Application of law to fact**.

This Court needs to resolve this conflict because historically throughout this country disbarment was and is a badge of dishonor always reserved for egregious cases. Now the Georgia court wants to use this punishment for perceived contempts of court and defaults. Fundamental fairness under the Due Process clause should prevent said utilization of that punishment.

VII. The Georgia case conflicts with several decisions of this Court:

A. ***Robinson v. Hanrahan***, 409 U.S. 38 (1972).

This Court found a 14th amendment violation of due process for the Illinois prosecutor to give notice of a vehicle forfeiture (on account of the petitioner's commission of a simple theft) by sending notice thereof to the petitioner at the address he listed with the motor vehicle bureau, when the prosecutor knew he was actually in jail awaiting trial on the charges.

Similarly, the general counsel of the Georgia bar sent bar notices to petitioner's old address from which he had evicted after petitioner and a staff investigator advised bar counsel that petitioner was no longer at the address. Said counsel also knew

petitioner's new address, and the head of the bar membership department knew of petitioner's home address in Dawson County, Georgia.

The bar was obliged to send the notices to the new post office box address, and when unsuccessful, to send the notices to petitioner's home address in Dawson County. Ordinary Georgia law so holds. *Abba Gana v. Abba Gana*, 253 Ga. 340 (1983).

B. ***Hess v. Pawloski***, 274 U.S. 352 (1927).

Although an old decision, Hess has been cited recently with approbation by the Court. That portion of the case that petitioner relies on is an important dictum, to wit: "It is required that he [the putative defendant] shall actually receive [the piece of registered mail] and receipt for [that is, acknowledge, receive and/or sign the] notice of the service and a copy of the process", 274 U.S. at 356. Hess was the first case to approve the use of registered mail to obtain personal jurisdiction of nonresident motorists who injured residents while traveling in the forum state.

C. ***Hannah v. Plumer***, 380 U.S. 460 (1965); ***City of N.Y. v. New York, N.H.& H. R.Co.***, 344 U.S. 293 (1953).

These cases hold that actual notice is the object of service of process provisions in the federal rules and in federal bankruptcy law, respectively. Such service rules prevail in the first case over more cumbersome state service rules and in the second case are required even when a creditor has knowledge of ongoing bankruptcy proceedings, but is entitled to statutory notice.

VIII. The Questions Presented are Important.

A. Dispensing with Actual Knowledge will Breed Disrespect for Law.

There is an instinctive need to believe in the fairness of judicial proceedings (Note, 88 *Harv. L. Rev.* 1510, 1540 (1975)). That need is not met when a citizen can be deprived of liberty and property without actual knowledge of the proceedings until after they are concluded and the punishment is meted. Americans are on the move: they move every five years. While it is not unreasonable to require them to notify creditors and others of their new address, oversights will occur. To think that the punishment for an oversight will be the loss of one's livelihood and profession and social infamy, virtually an economic and social death penalty is unthinkable. This Court must act now to stem this impermissible intrusion into the individual liberty interest implicit in the Due Process clause of the 14th amendment.

B. There cannot be one Due Process for the Diversity Cases and Another Due Process for Federal Question Cases.

Today there is only one concept of Due Process of Law. It applies to the states under the 14th amendment. It applies to the federal government under the 5th amendment. Prior to the incorporation of the rights in the first eight amendments into the 14th amendment, it was appropriate to think of two notions of Due Process, with the defendant in the federal system more fully protected. This, however, is no longer true. As shown above, two concepts of Due Process would lead to lack of uniform practice in the district courts depending on whether the plaintiff utilized the federal methods of service or the Georgia service by

mail provision. While petitioner is not arguing that state service by mail provisions are invalid under the 14th amendment, he is saying that actual notice must result from the use of a state's mail service statute or court rule.

Petitioner believes that the proper analysis of what process he is due should be judged under *Mathews v. Eldridge*, 424 U.S. 319 (1976), rather than under *Medina v. Calif.*, 112 S.Ct. 2572 (1992). An analysis is found on pp. 49-50 of petitioner's Exhibit "G" to Application No. A-53, filed in this Court on July 25, 1994.

C. Quasi-Criminal Attorney Discipli-nary Proceedings should be Governed by the Criminal Law, and not the Civil Law.

Petitioner explicitly calls upon this Court to make lawyers the first-class citizens that Justice Douglas said they were 27 years ago (*Spevack v. Klein*, 385 U.S. 511, 516 (1967)). When faced with loss of livelihood, work in progress, accounts receivable, loss of status, social and economic death sentence, a lawyer is entitled to all the protect-ions of the criminal law. This would be the perfect case to employ these safe-guards, as they are necessary to protect an innocent lawyer of the consequences of at most negligence and at the worse the mildest form of criminal contempt, itself calling for the protections of the criminal law. It would be unthink-able for a criminal defendant to be tried in absentia. *Lewis v. United States*, 146 U.S. 370, 372 (1892) ("A leading principle that pervades the entire law of criminal process is that, after indictment found, nothing shall be done in the absence of the prisoner."); *Wade v. United States*, 441 F.2d 1046 (D.C. Cir. 1971); *Illinois v. Allen*, 397 U.S. 337, 338 (1970),

D. The Individual Petitioner

A 1961 honors graduate of Duke University and a 1966 graduate of Harvard Law School, petitioner has devoted his entire adulthood to the private practice of law (with time out for public service), once serving as an assistant law clerk to a judge on the 5th Circuit court of appeals and regularly engaging in *pro bono publico* activities[36]. No other client or opposing counsel has ever filed a grievance against him in Georgia or any other state[37] (he remains a member in good standing of the bar of another state and several federal courts).

Petitioner has represented private clients in cases against Georgia governmental units (*MPACA v. Life of Ga.,*) and against judges who are Georgia resident (*In re Georgia Paneling Co.*). Perhaps because of these cases or because he is a solo practitioner, he has become the object of a "test case" (App. 24a) of the State Bar of Georgia and the Supreme Court of Georgia (with at least two of the majority justices members of the committee that drafted the Old Rules that petitioner argued persuasively were unconstitutional). He needs this Court's protection (See *Wood v. Georgia*, 450 U.S. 261 (1981)).

E. Professionalism

This has been much discussion of professionalism in recent years. This is salutary. Contrast general notions of professionalism with the State Bar of Georgia's General Counsel's statement: "It [(Old) Rule 4-208.2] does not require phone

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[36] Reconsideration Motion, Apr. 28, 1994, affidavit par. 16, 17, 18, 19.

[37] Id. affidavit par. 2.

calls." State Bar of Georgia brief, p. 6, filed Sept. 23, 1993, in Georgia court. A telephone call by bar counsel at any time during a year's period would have avoided this entire imbroglio.

CONCLUSION

As shown above, the Georgia case conflicts with recent legislation of Congress, with about half of the service rules in bar disciplinary codes, decisions of the Mississippi and West Virginia supreme courts, the United States Court of Appeals for the Fifth Circuit, and this Court. Moreover, the Georgia case confuses the "how" (or technique) of service of process with the "when" (or amenability) of personal jurisdiction. Therefore, this Honorable Court should grant this petition for a writ of certiorari.

Respectfully submitted,

WINFORD KENT BISHOP